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No. 96-483

In the Supreme Court of the United States

OCTOBER TERM, 1996

BRIAN FREDERICK LOWERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly sentenced petitioner to the ten-year mandatory minimum term of imprisonment required by 21 U.S.C. 841(b)(1)(A)(vii) for drug trafficking offenses involving 1000 or more marijuana plants, based on evidence that petitioner helped plant and cultivate more than 1000 marijuana plants.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 91 F.3d 161 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1996. The petition for a writ of certiorari was filed on September 25, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of conspiring to distribute marijuana and to possess marijuana with intent to

distribute it, in violation of 21 U.S.C. 846. He was sentenced to 120 months' imprisonment, to be followed by five years' supervised release. The court of appeals affirmed. Pet. App. 1a-2a.

1. Beginning in the late 1980s, petitioner was actively engaged with a group of people, including his father, Jimmie Lowery, in the cultivation of marijuana plants. James Crews and his brother, Kenneth Crews, had been growing and distributing marijuana for a number of years when, in 1985, Jimmie Lowery and Joe Newmans, the local sheriff, joined forces with the Crews brothers. In 1988 or 1989, petitioner became involved in the operation. His role was limited to the cultivation side of the business. He helped prepare the ground for planting, built beds in which to plant the marijuana, and helped plant and fertilize the marijuana. He also helped harvest the marijuana plants from the patches, and picked the marijuana leaves off the plants once they were transported to the Crews' farm. In 1989 or 1990, petitioner was brought into the group as a full partner. Gov't C.A. Br. 8-10, 33.

2. In determining the amount of drugs attributable to petitioner for purposes of preparing the presentence report (PSR), the Probation Office relied on a footnote to the Drug Quantity Table, Sentencing Guidelines § 2D1.1(c) n.*, which, at the time of petitioner's sentencing, provided that, for offenses involving 50 or more marijuana plants, each plant should be treated as the equivalent of one kilogram of marijuana.[1] Based on that one-plant/one-kilogram

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[1] Section 2D1.1(c) n.* (1993) provided in part:

In the case of an offense involving marihuana plants, if the offense involved (A) 50 or more marihuana plants, treat

equivalency, the PSR assigned petitioner a base offense level of 32, the level for marijuana trafficking offenses involving at least 1000 but no more than 3000 kilograms of marijuana. The PSR also concluded that petitioner was subject to a mandatory minimum of ten years' imprisonment under 21 U.S.C. 841(b)(1)(A)(vii), because his offense involved at least 1000 marijuana plants. PSR 3, 7.[2]

3. The district court largely adopted the findings of the PSR. It found by a preponderance of the evidence that in each of the years 1989, 1990, and 1991 petitioner was involved in the cultivation of 600 marijuana plants. It then applied the Guidelines' equivalency provision to convert the 1800 plants attributable to petitioner to 1800 kilograms of marijuana for purposes of applying the Drug Quantity Table, which corresponded to a base offense level of 32. With a two-level reduction because of petitioner's minimal role in the offense, petitioner's total offense level was 30, which resulted in a sentencing range at

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> each plant as equivalent to 1 KG of marihuana; (B) fewer than 50 marihuana plants, treat each plant as equivalent to 100 G of marihuana. *Provided*, however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana.

The Sentencing Commission amended that provision in November 1995 to eliminate the higher equivalency ratio for offenses involving 50 or more plants. Guidelines App. C, Amend. 516. The current version of the Guidelines provides for a uniform equivalency ratio of 100 grams of marijuana per plant. Guidelines § 2D1.1(c) n.* (1996).

[2] Section 841(b)(1)(A)(vii) provides that any person who commits a "violation of [Section 841(a)] involving * * * 1000 kilograms or more of * * * marihuana, or 1,000 or more marihuana plants regardless of weight * * * shall be sentenced to a term of imprisonment which may not be less than 10 years."

criminal history category I of 97-to-121 months' imprisonment. Because the statutory ten-year mandatory minimum sentence applied, however, petitioner's effective Guidelines sentencing range was 120-to-121 months. The district court sentenced petitioner to 120 months' imprisonment. Gov't C.A. Br. 7-8, 33-34; PSR 3, 7.

4. The court of appeals affirmed. Pet. App. 1a-2a. It rejected petitioner's contention that, because no live marijuana plants attributable to him were seized by law enforcement officers, his sentence should have been calculated under Guidelines § 2D1.1(c) n.* based on the weight of the processed marijuana obtained from the plants. Pet. App. 2a.[3] The court concluded (*ibid.*) that petitioner's argument was foreclosed by its recent en banc decision in *United States* v. *Shields*, 87 F.3d 1194 (11th Cir. 1996), in which it had held that the government need not seize live plants in order to hold a defendant accountable for possessing marijuana plants within the meaning of Guidelines § 2D1.1(c) n.*. The court in *Shields* explained that "[n]othing in the text of § 2D1.1 or § 841(b) suggests that their application depends upon whether the marijuana plants are harvested before or after authorities apprehend the grower." *Shields*, 87 F.3d at 1197.

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[3] The court also rejected petitioner's arguments that the district court erred (i) in denying his motion to dismiss for prosecutorial misconduct, (ii) limiting his right to cross-examine government witnesses, and (iii) finding that the number of marijuana plants involved in his offense totalled 1800. Pet. App. 2a. Petitioner does not contest those rulings.

ARGUMENT

Petitioner argues (Pet. 6-11) that the district court misapplied the equivalency provision of 21 U.S.C. 841 and Guidelines § 2D1.1(c) n.* in computing his sentencing range based on the number of marijuana plants attributable to him, rather than on the dry weight of the processed marijuana, because (Pet. i) he was "arrested after all harvesting t[ook] place and no plants [we]re seized."

1. There is no reason for this Court to consider petitioner's claim that the district court erred in applying the one-plant/one-kilogram ratio under Sentencing Guidelines § 2D1.1(c) n.*. Because petitioner received the minimum sentence permitted by the statute, any error in the district court's application of the Sentencing Guidelines would have been harmless. See *United States* v. *Silvers*, 84 F.3d 1317, 1326 (10th Cir. 1996), petition for cert. pending, No. 96-6225 (Oct. 4, 1996). Although petitioner now contends that the district court also misapplied the statute's one-plant/one-kilogram equivalency provision, that argument is not properly before this Court, because petitioner failed to raise it in the court of appeals, and the court of appeals did not otherwise consider it. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

2. In any event, even if petitioner had preserved his statutory argument, it is without merit. Section 841(b)(1)(A)(vii) provides that any person who commits a "violation of [Section 841(a)] involving * * * 1000 kilograms or more of * * * marihuana, or 1,000 or more marihuana plants regardless of weight * * * shall be sentenced to a term of imprisonment which may not be less than 10 years." By its terms, the

statutory mandatory minimum sentence is applicable to any defendant who commits a violation of Section 841(a) "involving" at least 1000 marijuana plants; nothing in the text suggests that application of the statutory one-plant/one-kilogram equivalency provision is limited to cases in which the government has seized live marijuana plants from the defendant. See *United States* v. *Shields*, 87 F.3d 1194, 1197 (11th Cir. 1996); *Silvers*, 84 F.3d at 1325-1326; *United States* v. *Wegner*, 46 F.3d 924, 928 (9th Cir. 1995); cf. *United States* v. *Wilson*, 49 F.3d 406, 410 (8th Cir.) (reaching same conclusion under Guidelines § 2D1.1(c)), cert. denied, 116 S. Ct. 384 (1995).

It is well settled, moreover, that as a general matter even where no drugs are actually seized, the government may prove the type and quantity of drugs attributable to a defendant through other evidence. See Sentencing Guidelines § 2D1.1, application note 12 ("Where there is no drug seizure * * * , the court shall approximate the quantity of the controlled substance."); Sentencing Guidelines § 6A1.3(a) (in making factual determinations related to sentencing, court may consider all "relevant information" that has "sufficient indicia of reliability to support its probable accuracy"). Nothing in Section 841(b)(1)(A)(vii) suggests that Congress intended to create a special exception to that rule for those convicted of possessing marijuana plants. See *Wegner*, 46 F.3d at 928 (statute does not "restrict the nature of the evidence which must underlie the sentence or require the conversion of evidence of plants into dry marijuana"); accord *Silvers*, 84 F.3d at 1327.

Finally, the plain import of the text is consistent with Congress's intention through Section 841(b)(1)(A)(vii) to punish large-scale growers of

marijuana plants more severely than small-scale growers or those involved in later steps of the distribution chain. See, *e.g.*, *United States* v. *Murphy*, 979 F.2d 287, 290 (2d Cir. 1992); *United States* v. *Haynes*, 969 F.2d 569, 573 (7th Cir. 1992); *United States* v. *Osburn*, 955 F.2d 1500, 1508 (11th Cir.), cert. denied, 506 U.S. 878 (1992). The evidence in this case established that petitioner helped cultivate more than 1000 marijuana plants. He prepared the fields, tended the plants, and harvested the leaves. Under any ordinary understanding of the term, petitioner's offense "involved" marijuana plants, and his sentence was therefore properly calculated based on the number of marijuana plants attributable to him. See *Wegner*, 46 F.3d at 928; *Haynes*, 969 F.2d at 573.

2. Contrary to petitioner's argument (Pet. 7-11), there is no conflict between the court of appeals' decision and decisions of the Second and Sixth Circuits warranting this Court's review. Although the Sixth Circuit stated in *United States* v. *Stevens*, 25 F.3d 318 (1994), that the one-plant/one-kilogram equivalency provision was applicable only to "live marijuana plants found," *id.* at 323, the defendant in that case had purchased already-processed marijuana for resale; there was no evidence that he had any involvement in growing, harvesting, or processing the plants. *Id.* at 319-320. The Sixth Circuit has since made clear that a defendant convicted of manufacturing marijuana plants is properly sentenced under the equivalency provision "based on the number of marijuana plants he had grown, even though at the time of his arrest the plants had been 'harvested.'" *Oliver* v. *United States*, 90 F.3d 177, 178 (1996). See also *id.* at 179 ("[S]o long as the government can prove * * * that a particular grower

charged with manufacture grew a particular plant, sentencing should be based on the equivalency ratio in the sentencing guidelines.").

In *United States* v. *Blume*, 967 F.2d 45 (2d Cir. 1992), the court ruled that, under Section 841(b)(1)(A)(vii), sentencing courts are to "measure live marijuana by the number of plants and dry leaf marijuana by weight." 967 F.2d at 49 (internal quotation omitted). The Second Circuit has retreated from that position, however. In *United States* v. *Murphy*, 979 F.2d 287 (1992), the defendant (a marijuana grower) contended that the mandatory minimum sentencing provision violates due process because it irrationally treats a grower "who is arrested immediately prior to harvesting * * * more harshly than one arrested after the marijuana is harvested." *Id.* at 290. The court of appeals agreed that that would be anomalous. *Ibid.* "The solution," the court reasoned, "is to increase the harvester's sentence rather than to decrease the grower's sentence." *Ibid.* Thus, it held, "if there is proof that a defendant has recently harvested * * * marijuana plants, and the marijuana in his or her possession is the fruit of those poisonous plants, * * * that individual should be sentenced as if the plants had not yet been harvested." *Ibid.* In light of its holding in *Murphy*, the Second Circuit would likely reach the same result as the court below in the circumstances presented by this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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